IN THE

Supreme Court of the United States

October Term, 1973

No. 73-502

ARTHUR J. LUCK and GLENN A. HENRY,

Petitioners,

vs.

UNION OIL CO. OF CALIF.; MOBIL OIL CORP.; GULF OIL CORP.; TEXACO INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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UNION OIL CO. OF CALIF.; MOBIL OIL CORP.; GULF OIL CORP.; TEXACO INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners Arthur J. Luck and Glenn A. Henry respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on September 20, 1973.

Opinions Below.

The opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is unreported at this writing and is printed in Appendix A to this petition, filed September 20, 1973.

The opinion of the District Court for the Central District of California is printed in the Appendix as follows:

1. Report of Special Masters (Appendix B) filed August 4, 1970.
2. Judgment (Appendix C) filed August 18, 1970.

Jurisdiction.

The judgment of the Ninth Circuit Court of Appeals was entered on September 20, 1973. No petition for rehearing was filed. The judgment of the United States District Court for the Central District of California was entered on August 18, 1970, adopting the Report of Special Masters filed on August 4, 1970. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented.

I.

DOES THE OUTER CONTINENTAL SHELF LANDS ACT, TITLE 43, UNITED STATES CODE, SECTION 1333, *et seq.* PERMIT THE APPLICATION OF ADMIRALTY LAW CONTRARY TO THE ENUNCIATION OF THIS COURT IN *RODRIGUE V. AETNA CASUALTY AND SURETY CO.*, (1969) 395 U.S. 352?

II.

WHETHER MARITIME LAW OR THE LAW OF THE ADJACENT STATE AS SURROGATE FEDERAL LAW IS APPLICABLE IN THE EVENT OF A MAJOR OIL SPILL DISASTER EMANATING FROM AN OFF-SHORE DRILLING PLATFORM?

III.

IS IT TIME FOR THIS COURT TO RECONSIDER AND OVERRULE THE DOCTRINE OF *THE CONQUEROR*, (1897) 166 U.S. 110, DENYING COMPENSATION FOR LOSS OF USE OF A PRIVATE PLEASURE YACHT UNDER ADMIRALTY LAW?

Statutory Provisions Involved.

This case involves the Outer Continental Shelf Lands Act, Title 43, United States Code Section 1333 (hereinafter, "Lands Act"), the relevant and applicable sections of which are as follows:

Section 1333 (a)

"(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the Outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the Outer Continental Shelf were an area of exclusive Federal Jurisdiction located within a State:

"(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the

United States. State taxation laws shall not apply to the Outer Continental Shelf."

and: California Civil Code § 3333.

"BREACH OF OBLIGATION OTHER THAN CONTRACT. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

Statement of the Case.

The basis for Federal jurisdiction in this case is procedurally unique. Petitioners initially filed their actions as plaintiffs in the Superior Court of the State of California for the County of Santa Barbara. The respondents filed a Petition for Removal to the Federal Court, based upon the authority of the Lands Act, which confers original and exclusive jurisdiction upon the Federal Court with respect to all matters arising on the outer continental shelf. At no time did any of the parties attempt to invoke the jurisdiction of an admiralty Court. Neither did any of the parties attempt to invoke diversity of citizenship as a jurisdictional prerequisite. Only under the Lands Act did this case qualify for Federal jurisdiction, and then at the instance of the respondents. Another unique aspect is that the District Court, on a number of occasions, ordered changes in the caption of these cases, probably to make less cumbersome or to facilitate the filing of tens of thousands of documents in the many claims filed against

the respondents. Note the differences in the captions in Appendices A, B and C. The caption on this Petition accurately reflects the interested parties hereto.

This Petition for Writ of Certiorari is a direct outgrowth of the Santa Barbara oil spill disaster of January 28, 1969. The petitioners herein are only two of 34 plaintiffs alleging damages on behalf of all other owners of pleasure yachts who sustained physical damages to their yachts, and suffered loss of use thereof during a period of time that 800 square miles of the Santa Barbara Channel were covered with crude oil emanating from respondent Union Oil Company's Platform "A."

Numerous actions were filed, first in the Santa Barbara Superior Court, and thereafter in the United States District Court for the Central District of California. The two petitioners herein were selected by the Court and all counsel to act as test cases on behalf of all others to determine an important question of law whose resolution will have immediate importance far beyond the particular facts and the parties involved. The District Court granted permission to appeal to the Ninth Circuit in order to accomplish this objective.

The facts of the oil spill disaster are not in dispute. Some 800 square miles of the coastal waters of the Pacific Ocean in the Santa Barbara Channel were covered with raw crude oil, as the result of a blowout of an oil well on respondent Union Oil Company's Platform "A." Vast quantities of this oil ultimately found its way into the Santa Barbara Harbor, and in addition

thereto coated some 40 miles of the coastline of Santa Barbara and Ventura Counties. As a result of the presence of the crude oil upon the surfaces of the ocean, petitioners were unable to use their boats for pleasure purposes, or were too prudent to venture into the oil-coated waters, and thereby were deprived of the use of their respective vessels for some considerable period of time.

After the cases were at issue, they were consolidated for trial in the District Court under two Master File designations, one of which bears the name of their attorney, and thereafter a Stipulation was entered into by and between all counsel for all parties and became an Order of Court on May 11, 1970, whereunder the respondents herein agreed to pay, "All legally compensable damages arising from a legally cognizable injury."

Petitioners relied upon the opinion of this Court in the case of *Rodrigue v. Aetna Casualty and Surety Co.,* (1969) 395 U.S. 352, 23 L.Ed. 2d 360, 89 S.Ct. 1835, in which this Court held that admiralty law was not applicable under the Lands Act, and that the law of the adjacent state shall be applied to all occurrences on the artificial islands therein described and defined. Under *Rodrigue,* the law of the adjacent state is thus adopted as Federal law on the question of loss of use of a luxury vessel, absent a pecuniary loss. California law recognizes loss of use as part of the damages recoverable for injury to personal property as defined in California Civil Code § 3333.

Respondents relied, among other things, upon the doctrine of *The Conqueror,* (1897) 166 U.S. 110, which holds that under admiralty law, loss of use of a pleasure yacht is not a compensable item of damages, absent a pecuniary loss.

After the Stipulation became an Order of Court, the Honorable Special Masters applied admiralty law and held that loss of use of a pleasure yacht is not a compensable item of damages under admiralty law, and declined to apply California law. See Appendix B, annexed hereto. The District Court entered judgment pursuant to the record of the Special Masters. See Appendix C, annexed hereto. The Ninth Circuit affirmed. See Appendix A, annexed hereto.

REASONS FOR GRANTING THE WRIT.

I.

The Decision Below Is in Conflict With Applicable Decisions of This Court as to the Proper Interpretation of the Outer Continental Shelf Lands Act, Title 43, United States Code, Section 1333.

This Court, in *Rodrigue,* decided that under the Lands Act, the law of the adjacent state shall be applied to all occurrences arising on off-shore oil drilling platforms, which are therein defined as "artificial islands." This Court diligently examined the intent of Congress in enacting the Lands Act and determined that admiralty laws shall *not* be applied in cases arising under the Lands Act. This Court pointed out that it had made careful scrutiny of the Hearings which were the basis for eliminating from the Lands Act the treatment of artificial islands as vessels.

Thereafter in *Chevron Oil Co. v. Huson,* (1971) 404 U.S. 97, 92 S.Ct. 349, this Court has made it clear that the Lands Act deliberately eschewed the application of admiralty principles to these novel structures, and in so holding, has stated that the law of the adjacent state becomes Federal law under the Lands Act. This Court expanded upon its decision in *Rodrigue,* and twice emphasized in an italicized word that the Lands Act does *not* make admiralty law applicable.

In *Chevron Oil,* this Court recognized that prior to the Lands Act there was a line of Federal Court decisions interpreting the Lands Act to make general ad-

miralty law applicable. However, after the emphasis, this Court said,

> "As we pointed out in *Rodrigue,* Congress recognized that 'the Federal Code was never designed to be a complete body of law in and of itself' and thus that a comprehensive body of state law was needed."

In a footnote to the *Chevron Oil* opinion, the Court cited *Levenson v. Deupree,* 345 U.S. 648, which involves an action under a statute which ousts admiralty law and specifically directs that state law shall be adopted as Federal law. Again, in the same footnote, the Court cited *Richards v. United States,* 369 U.S. 1, which held that under the Federal Tort Claims Act, a Federal Court must apply "the whole law of the state where the act or omission occurred," and that insofar as *Richards* bears on the present case (*Chevron*), it supports the Court's holding that Federal Courts should not create interstitial Federal common law when the Congress has directed that a whole body of state law shall apply.

In *Executive Jet Aviation Inc. v. City of Cleveland,* 409 U.S. 249 (1972), this Court held that maritime locality alone is not a sufficient predicate for admiralty jurisdiction in aviation tort cases; in the absence of legislation to the contrary, claims arising from airplane accidents are not cognizable in admiralty unless the wrong bears a significant relationship to traditional maritime activities.

The Court below recognized that *Executive Jet* broadened the power of the states to apply their own laws to certain maritime torts occurring within their territorial waters, but declined to apply California law to the claim of the petitioners.

Askew v. American Waterways Operators, Inc., 41 U.S.L.W. 4507 (1973), ... U.S. ...., involved the application of Florida law which imposes strict liability for damages incurred as the result of an oil spill in the state's territorial waters. Defendants in that case appeared to have attempted to invoke admiralty jurisdiction to the exclusion of Florida law. However, this Court reversed the lower Court in that case which had decided Florida law as unconstitutional, saying,

> ". . . to rule as the District Court has done is to allow Federal admiralty jurisdiction to swallow most of the police power of the states over oil spillage—an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are dependent." (Page reference not yet available.)

Again, in the next paragraph, this Court said,

> ". . . it is clear at the outset that the Federal act does not preclude, but in fact allows, state regulation. § 1161(o) provides that:
>
> (1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any offshore facility to any person or agency *under any provision of law for damages to any publically-owned* (sic) *or privately-owned property* resulting from a discharge of any oil or from the removal of such oil." (Emphasis by the Court.)

The same problem is presented in this case as was presented in *Askew*. California law provides a remedy for loss of use of a pleasure yacht, while maritime law does not.

It is respectfully submitted that drilling for oil, an ultra-hazardous activity, bears no relationship whatsoever to traditional maritime activities. Therefore, the state law of California, to wit, Civil Code Section 3333, should be applied as surrogate Federal law under the provisions of the Lands Act.

Thus, the writ should be granted because important questions of law and statutory construction are presented to the Court, the resolution of which will have immediate importance far beyond the particular facts of the Santa Barbara oil spill disaster, and the particular parties involved.

II.

The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to the Proper Interpretation of the Lands Act.

The Fifth Circuit in the case of *Bertrand v. Forest Corp.*, (1971) 441 F.2d 809 said,

> "The Lands Act makes it clear that Federal law is to be applied to artificial island drilling rigs on the seabed of the Continental Shelf to the exclusion of general maritime law." And that Court cited *Rodrigue*.

In another Fifth Circuit case, *Peytavin v. Government Employees Insurance Co.*, (1973) 453 F.2d 1121, that Court again cited *Rodrigue*, and said,

> "In view of the metamorphosis which the traditional maritime tort jurisdictional rule has under-

> gone since the Plymouth sailed over 100 years ago and the difficulty in applying its modern-day progeny to the facts of this case we find it appropriate to note that in general the Courts have denied maritime tort jurisdiction where the circumstances of a suit failed to demonstrate any substantial connection with maritime activities or interests."

It is thus readily apparent that the decision below, reprinted in Appendix A, is in direct conflict with the two opinions of the Fifth Circuit. Thus, it is manifest that there is a direct conflict between the opinions of the Fifth Circuit, and the opinion of the Ninth Circuit respecting the proper interpretation of the Lands Act, thus another reason has been advanced to justify the granting of the writ.

III.

The Court Below Has Virtually Invited This Court to Re-examine and Overrule the Doctrine of The Conqueror, (1897) 166 U.S. 110.

The Court below summarily disposed of the contention of the Petitioners respecting loss of use of their vessels in one paragraph, designated in the opinion as Paragraph IV. In a footnote to that paragraph, the Court stated,

> ". . . in our view it takes a new and contrary holding of the Supreme Court before we are relieved of our obligation to following previous holdings of that Court." (Referring to *The Conqueror.*)

At the time that this Court decided *The Conqueror,* there were probably no more than 100 private pleasure yachts in the entire United States. Luxury yachts were undoubtedly a novelty in those days, and the owner-

ship of such yachts was limited to persons of wealth such as Commodore Vanderbilt, the owner of The Conqueror. However, now, more than three-quarters of a century later, millions of average Americans own and use private pleasure craft on all three coasts of the United States. These millions of persons have spawned a multi-billion dollar industry, which in turn supports financial institutions and many, many periodicals and publications. Circumstances have changed so drastically, and recreational boating has experienced such a tremendous growth as to justify a re-examination of *The Conqueror,* and reversing the doctrine therein set forth.

As far as counsel is able to discern, no case has been brought before this Court in the last 40 years squarely upon this point, in a case that would justify reversal. Recreation as a way of life, or as an industry was just beginning to establish a pattern 40 years ago. At the time of the decision in *The Conqueror,* for instance, the United States had only one national park. Today it has dozens, and hundreds of national forests, reserves, and monuments. Recreation, and its attendant industries are recognized as an important part of American life. Reconsideration by this Court, and a decision herein will affect millions of persons engaged in recreational boating, that entire industry, and the oil industry as well. Hundreds of oil drilling platforms exist in the Gulf Coast area, more than a dozen exist on the Pacific Coast, and the oil industry contemplates that many more will soon exist on the Pacific Coast, and particularly in the Santa Barbara Channel. Such oil drilling platforms may also soon exist on the Atlantic Coast. Oil spill disasters of the magnitude of the Santa Barbara Channel oil spill disaster are reasonably to be expected.

A recurrence here, or a similar occurrence in the Gulf Coast will affect the right of the owners of recreational boats to use their vessels. This naturally would also follow if oil exploration begins on the Atlantic Coast. More than the right to navigation is involved, not just the "occasional Sunday piscatorial pleasure" as the Court said in its opinion below. Of what use is a private pleasure yacht literally interned in its harbor, engulfed in oil? It cannot be used. Under such circumstances, the owner of such vessel is discouraged from even entertaining aboard the vessel, a common present practice.

This Court apparently recognized that the time was approaching to overrule the doctrine of *The Conqueror,* although the present question was not before the Court in the case of *Brooklyn East District Terminal v. United States,* (1932) 287 U.S. 170.

In *Brooklyn,* the Court said,

> "The vessel may be a yacht, employed for pleasure and not for business. Even then, in the judgment of many courts, the value of the use may be considered by the triers of the facts in fixing the recovery if there has been a substantial impairment of that enjoyment for which such vessels are maintained. There are statements in *The Conqueror* (166 U.S. p. 133, 41 L.Ed. 947, 17 S.Ct. 510) that may be in conflict with that view, but they were not essential to the judgment (p. 134), and in the light of later decisions as to the loss of pleasure vehicles are unquestionably in opposition to a stronger current of authority."

Petitioners readily concede that the statement of Mr. Justice Cardozo in *Brooklyn* was dicta, but that dicta appears to be ready to become modern admiralty law.

One Court, the District Court for the Southern District of Florida in the case of *Finkel v. Challenger Marine Corp.*, (1970) 316 F.Supp. 439 said,

> "Earlier cases seem to hold that the owner of a private pleasure yacht is not entitled to recover for loss of use when it is detained due to the wrongful act of another party." *The Conqueror,* 166 U.S. 110 (1897). The modern view, however, seems to be that a private pleasure yacht falls in the same category as any repairable chattel, such as an automobile, even though no substitute vessel is chartered to take its place during the period of detention. *Brooklyn East District Terminal vs. United States* (1932), 287 U.S. 170."

The Tax Court has also recognized that the use of a yacht has value. In *Offshore Operations Trust,* a tax Court case (*Offshore Operations Trust v. Commissioner, Walter S. Baird and Mary D. Baird v. Commissioner,* CCH Dec. 32, 149 (M); Dkts. 1053-71, 724-72, 723-72, September 24, 1973, T.C. Memo. 1973-212), held that the rental value of a company boat that is used by a shareholder for personal purposes can be a constructive dividend to him. In addition thereto, the Court held that the standby value, or the rental value for the time that the boat is not actually used by the shareholder, but is at his disposal, represents a contructive dividend. Thus, the sole shareholder and beneficiary of a Massachusetts trust, who paid $180.00 for the use he made of a trust-owned seagoing yacht was taxable on another $180.00 which the Tax Court found to be the standby value of the vessel for the additional time that it was available for the shareholder's personal use.

Neither *Finkel,* nor *Offshore Operations Trust* are binding upon this Court. Nevertheless, these cases,

taken in conjunction with the analogy herein presented provide adequate reason for this Court to grant the writ of certiorari. These are, important questions of statutory interpretation, proper application of the law, which certainly affect the rights of millions of people, and the conflicting rights of two major industries, the oil industry and recreational boating industry. Taken together, there are now important questions which have not been decided by this Court in a factual situation such as the Santa Barbara Channel oil spill disaster, as to which law is applicable in a recurrent situation.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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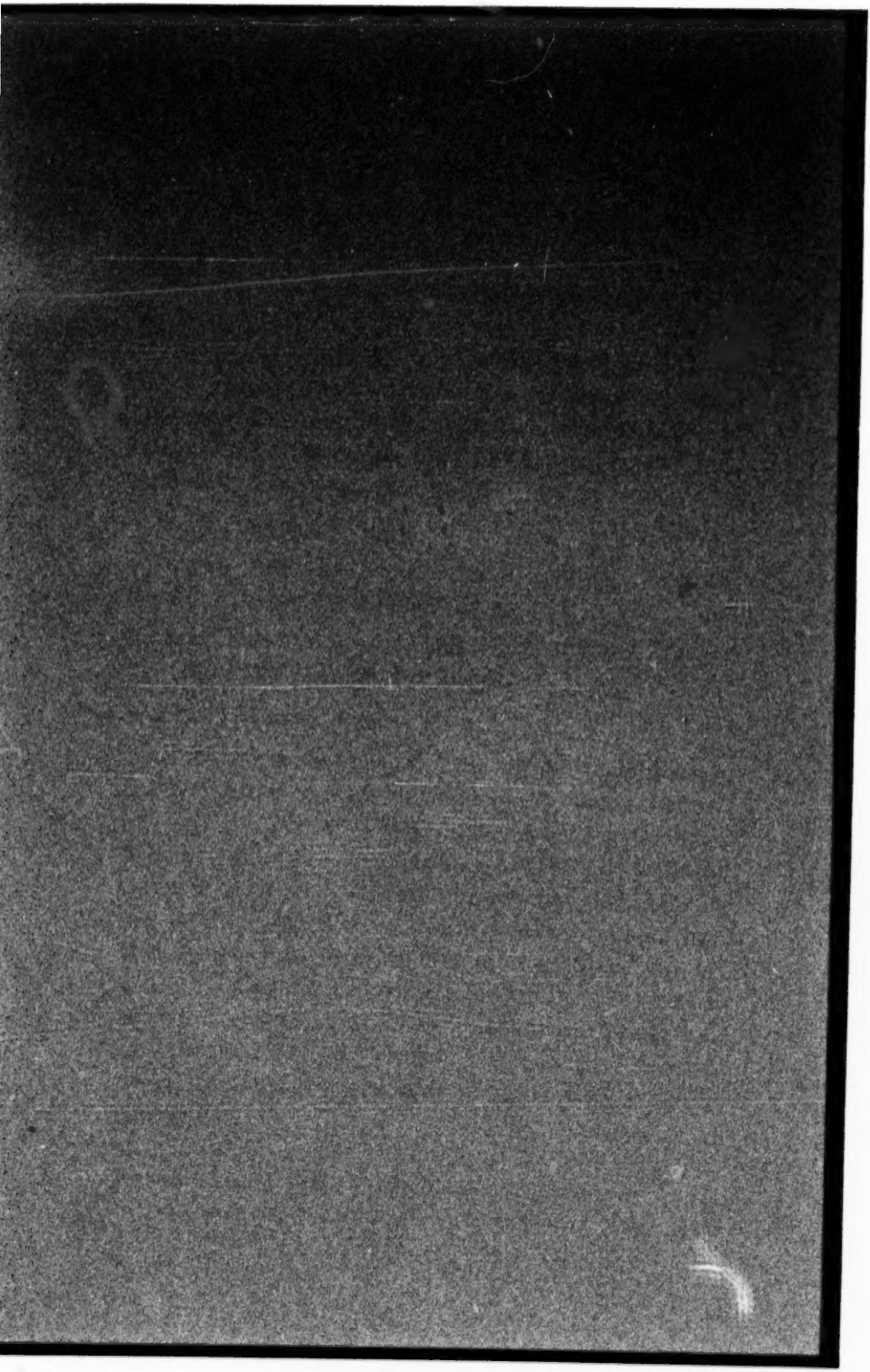

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals, for the Ninth Circuit.

James J. Oppen, et al., Plaintiffs, Arthur J. Luck and Glenn A. Henry, Plaintiffs-Appellants, v. Aetna Insurance Co., et al., Defendants, Union Oil Co. of Calif.; Mobil Oil Corp.; Gulf Oil Corp.; Texaco Inc., Defendants-Appellees. No. 71-1136.

FILED: Sept. 20, 1973.

Appeal from the United States District Court for the Central District of California.

Before: HAMLEY and WRIGHT, Circuit Judges, and POWELL, District Judge.*

WRIGHT, Circuit Judge:

In this appeal we must decide whether plaintiffs may recover certain damages caused by the Santa Barbara oil spill disaster of 1969. Preliminary questions are whether general maritime law applies to plaintiffs' claims and, if so, whether the application of maritime law precludes the plaintiffs from recovering under state law. A panel of three special masters[1] took the evidence by stipulation and concluded that the claims involved should be determined by reference to maritime law, that the maritime remedy was exclusive, and that under maritime law plaintiffs' damages were not compensable.

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*Senior District Judge, Eastern District of Washington.

[1]The special masters were judges of the Superior Court, Santa Barbara County.

Subsequently, the Supreme Court substantially altered what had theretofore been the standard used by lower federal courts[2] in determining whether a tort was a maritime one, *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249 and also broadened the power of the states to apply their own laws to certain maritime torts occurring within their territorial waters, *Askew v. American Waterways Operators, Inc.,* .... U.S. .... (1973). This court asked the parties for additional briefs considering the effect of those decisions. We now conclude that the decision of the special masters was correct and the judgment of the district court entered thereon should be affirmed.

I.

On January 28, 1969 large amounts of crude oil escaped from the ocean floor underneath and near Platform "A" maintained by appellee Union Oil Company of California (Union) for the benefit of itself and other oil companies. Platform "A" was on the outer Continental Shelf of the United States in the Santa Barbara Channel. Escaping oil floated to the surface of the ocean and was carried by wind and tide until it virtually permeated the waters of the Santa Barbara Channel and harbor.

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[2]*See, e.g., Weinstein v. Eastern Airlines, Inc.,* 316 F.2d 758 (3d Cir. 1963) wherein the court stated:

> "The critical factor in determining whether a tort claim comes within the broad statutory grant of admiralty jurisdiction is the situs of the tort; i.e., the place where it happened. If the tort occurred on navigable waters, the claim is one that lies within the jurisdiction of the courts of admiralty; nothing more is required." *Id.* at 761 (footnote omitted).

Weinstein was expressly overruled in *Executive Jet.* See ..... U.S. at .....

Not surprisingly, many lawsuits were brought against the oil companies and their insurers. Certain of these suits brought in the United States District Court for the Central District of California were, by stipulation, consolidated under the caption "Oppen v. Union Oil Co. of California, Civil No. 69-576-ALS."[3]

The parties to the consolidated action agreed to proceed before the special masters with the trial of the claims of seven representative boat owners in order to obtain rulings on certain legal issues prior to trial of the other claims. Before this hearing could be held five of the boat owners' claims were settled.

Trial was held on the claims of the other two owners, appellants Henry and Luck. Each owned a private pleasure boat which had sustained physical damage

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[3]The stipulation further provided:

"3. In order to provide a basis for the disposition of the above referenced claims it is agreed by the undersigned defendants that they will pay to the above referenced persons and/or plaintiffs who are, or who by reason of subsequent joinder herein become, parties hereto, *all legally compensable damages arising from a legally cognizable injury caused by the aforementioned occurrence* as such damages are determined pursuant to the following provisions; provided, however, that the payment assumed hereby will not exceed such amount and such claim as said defendants or their contractors would be responsible for in a case of negligence."

It then went on to set out the procedures that would be followed.

"All claims not settled will be tried by a special master, sitting without jury. The right to a jury trial is expressly waived. The master shall decide the questions whether any damages asserted would be recoverable in a case of negligence and the amount of said damages.

* * *

"5. Each decision of a special master or the special masters shall be subject to approval by the Court and upon being so approved shall be entered as a separate, independent and final judgment of the Court. The right to appeal is waived in any case where the judgment is less than $10,000.00, unless the Court in its discretion orders otherwise."

from contact with the oil slick. The boats had also been rendered unusable in the Santa Barbara channel for a period of time as a result of the spill. The special masters concluded that federal maritime law was applicable to the plaintiffs' claim and thereunder loss of use of a private pleasure craft was not a compensable item of damage.[4] A judgment was rendered accordingly and the district court granted leave to appeal that we might render an opinion prior to the trial of the remaining claims.

II.

Plaintiffs' initial contention was that California law applied to their claims by virtue of the Outer Continental Shelf Lands Act ("Lands Act"), 43 U.S.C. §1301 et seq. and *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969). In our view plaintiffs read too much into the statute and the decision.

Section 1333(a) of Title 43 provides:

> "(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State. . . .
>
> "(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now

[4]The plaintiffs were awarded compensation for the physical damage to their vessels.

> in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953, are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf. . . ."

In *Rodrigue* the Supreme Court was faced with the question of whether the Death on the High Seas Act[5] or the Louisiana wrongful death statute[6] applied to suits resulting from two accidents occurring on fixed platforms on the outer Continental Shelf off the Louisiana coast.

Both accidents had their primary locus on fixed platforms. In one the decedent was performing a test high on a derrick rising above the platform and fell to his death on the floor of the structure. In the other the decedent was working on a crane mounted on the platform and being used to unload a barge. As the crane lifted a load from the barge it collapsed and toppled over onto the barge, killing the worker.

In both cases the Court held that under admiralty principles the Seas Act did not apply. Therefore there was no federal law inconsistent with the Louisiana wrongful death statute and, by virtue of the Lands Act, the latter applied. The Court went on to state categori-

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[5]46 U.S.C. §761 *et seq.*

[6]La. R.C.C. Art. 2315.

cally that federal maritime law had no more application to accidents occurring on these fixed structures than it would to accidents occurring on natural islands or on piers extending from the mainland.[7] 395 U.S. at 366.

It is clear that the Court by its holding in *Rodrigue* did not intend to imply that every occurrence arising out of operations conducted on a fixed platform attached to the outer Continental Shelf would necessarily be governed by state law rather than federal maritime law.

There are well recognized situations where admiralty jursidiction and maritime law apply to a tort whose locus is on land. For example, the Admiralty Extension Act[8] provides that admiralty jurisdiction applies to any injury *caused* by a vessel on navigable water though the injury may be consummated on land. And in *Continental Oil Co. v. London Steam-Ship Owners' Mutual Ins. Ass'n*, 417 F.2d 1030 (5th Cir. 1969), the court found that the Louisiana Direct Action Statute[9] was not applicable to a suit arising from the collision of an oceangoing vessel with a fixed drilling platform on the outer Continental Shelf. Although by traditional standards, the "locus" of the tort was on the platform,[10] the court found that the Admiralty Extension Act placed this tort within admiralty jurisdiction and that federal maritime law rather than state law applied.

See also Kimble v. Noble Drilling Corp., 416 F.2d 847 (5th Cir. 1969), where the court held that the

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[7]Piers extending from the mainland into navigable waters are treated as part of the land. *The Plymouth*, 70 U.S. 20 (1865); *Hastings v. Mann*, 340 F.2d 910 (4th Cir. 1965).

[8]46 U.S.C. §740.

[9]La. Code of Civil Procedure Art. 42.

[10]*See The Plymouth*, 70 U.S. 20 (1865).

Jones Act[11] applied to a seaman injured on an offshore drilling rig, stating:

> "The Outer Continental Shelf Lands Act does not oust admiralty law having a basis of applicability independent from the location of the platforms at sea; indeed, it specifically provides that the general law of the upland state is made the applicable federal law *only to the extent* that it is 'not inconsistent with * * * other Federal laws.' * * * The case at bar is distinguishable [from *Rodrigue*] in that the Jones Act and the general maritime law do apply of their own force here; they would still apply, in fact, even if we assumed that Kimble received his injuries in the heart of the Louisiana mainland, so long as he was acting at the time as a seaman in the service of his ship." 416 F.2d at 850.

Directly in point is *Armstrong v. Chambers & Kennedy,* 340 F. Supp. 1220 (S.D. Tex. 1972). In that case an explosion and fire on an offshore drilling platform resulted in injury to persons and property on a vessel tied alongside the platform. The court held that maritime law rather than Texas law applied to these claims. *Id.* at 1233.

These decisions indicate that the Outer Continental Shelf Lands Act, as interpreted in *Rodrigue,* does not preclude the application of maritime law to claims with a maritime nexus wholly apart from the location of the platform on the navigable waters.

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[11]46 U.S.C. §688.

III.

The locus of a tort is the place where injury takes effect. *T. Smith & Son, Inc. v. Taylor,* 276 U.S. 179 (1928); *Bible v. Chevron Oil Co.,* 308 F. Supp. 312 (E.D.La. 1969), *aff'd* 460 F.2d 1218 (5th Cir. 1972).

Here, the injuries were the physical damage to plaintiffs' boats incurred while they were on the water and the interference with the plaintiffs' alleged navigational rights in the Santa Barbara Channel. Necessarily these injuries "took effect" in the navigable waters of the United States. *See Sound Marine & Machine Corp. v. Westchester County,* 100 F.2d 360 (2d Cir. 1938); *State Dep't of Fish and Game v. S.S. Bournemouth,* 307 F. Supp. 922 (C.D. Cal. 1969); *see also Marine Cooks & Stewards v. Panama Steamship Co.,* 265 F.2d 780 (9th Cir. 1959), *rev'd on other grounds* 362 U.S. 365 (1960); *Maier v. Publicker Commercial Alcohol Co.,* 62 F. Supp. 161 (E.D. Pa. 1945), *aff'd* 154 F.2d 1020 (3d Cir. 1946).

Initially, defendants took the position that a finding that the injury took effect on navigable water was dispositive of the choice of law issue in their favor. Had not the *Executive Jet* decision come down since oral argument we would have agreed. *See Hess v. United States,* 259 F.2d 285 (9th Cir. 1958), *vacated on other grounds* 361 U.S. 314 (1960); *United States v. Matson Navigation Co.,* 201 F.2d 610 (9th Cir. 1953). But in light of *Executive Jet* a resolution of the choice of law issue based on locality alone is not sufficient. We must also decide whether the wrong bears "a significant relationship to traditional maritime activity." 409 U.S. at 268.

The plaintiff in *Executive Jet* owned a jet aircraft used for charter hire. In July 1968 it took off from Burke Lakefront Airport in Cleveland on a flight to Portland, Maine. Shortly after takeoff and while over land the aircraft ingested a flock of seagulls into its engines and suffered almost a total loss of power. It descended toward the airport, struck a fence and truck and then settled into the navigable waters of Lake Erie, becoming a total loss. The major part of the damage was done by water.

Plaintiff sued the air traffic controller, the airport operator and its manager for negligence in United States District Court for Northern Ohio on the basis of the admiralty jurisdiction. 28 U.S.C. §1333(1); *see Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir. 1963). The district court dismissed the complaint, holding that "the tort in this case did not occur upon navigable waters and the action is not cognizable in admiralty." The Court of Appeals for the Sixth Circuit affirmed in a 2-1 decision. 448 F.2d 151 (1971).

While the Supreme Court affirmed the judgment of dismissal it did so on altogether different grounds. The Court declined to decide whether the tort "occurred" upon the navigable waters. Rather, as we have noted, it held that more was required than mere maritime locality in order to involve admiralty jurisdiction. It then found that, upon the facts of this case, the additional requirement that the wrong bear a significant relationship to traditional maritime activity had not been met.

Executive Jet does not compel a reversal in the present case. Neither the tort there alleged (negligent failure to clear the runway) nor the resulting in-

jury (property damage to the aircraft) bore any relationship to traditional maritime activity. In our case plaintiffs sought damages for physical injury to maritime vessels and for interference with their rights of navigation. Such claims do bear a significant relationship to traditional maritime activity. It is precisely plaintiffs' alleged rights to engage in "traditional maritime activity" that they are seeking to protect.

In their supplemental brief plaintiffs contend vigorously that defendants were not engaging in "traditional maritime activity." However, the nature of defendants' activities is not dispositive. *See Philadelphia, Wilmington & Baltimore Railroad Company v. Philadelphia & Havre De Grace Steam Towboat Co.*, 64 U.S. 209 (1859); *Firemen's Fund Ins. Co. v. Standard Oil of California*, 339 F.2d 148 (1964); *Sound Marine & Machine Corp. v. Westchester County, supra; The America*, 34 F. Supp. 855 (E.D.N.Y. 1940). We hold that plaintiffs' claims for property damage to their vessels and for interference with their right of navigation sound in maritime tort. *Accord: American Waterways Operators, Inc. v. Askew*, 335 F. Supp. 1241 (M.D. Fla. 1971), *rev'd on other grounds*, ... U.S. ..... (1973); *Salaky v. Atlas Barge No. 3*, 208 F.2d 174 (2d Cir. 1953).

IV.

Under federal maritime law loss of use of a private pleasure boat is not a compensable item of damages. *The Conqueror*, 166 U.S. 110 (1897).[12] *A fortiori*

[12]Plaintiffs contend that *The Conqueror* has been limited by *Brooklyn Eastern District Terminal v. United States*, 287 U.S. 170 (1932). While one court has agreed with this contention (*see Finkel v. Challenger Marine Corp.*, 316 F. Supp. 549 (S.D. Fla. 1970)), we do not. The cited language in *Brooklyn* (287 U.S. at 175) was dictum. In our view it takes a new and contrary

no cause of action sounding in maritime tort can be maintained when the alleged injury is interference with plaintiffs' use of their boats in the Santa Barbara Channel.

V.

The special masters assumed that their holding that plaintiffs' injury was caused by a "maritime tort" committed by defendant precluded the application of California law to plaintiffs' claim. At the time it was made this assumption was based on good authority,[13] and was consistent with the holding of the court in *American Waterways Operators, Inc. v. Askew,* 335 F. Supp. 1241 (M.D. Fla. 1971). However, since that time, *Askew* was reversed by the Supreme Court, *Askew v. American Waterways Operators, Inc.,* ..... U.S. ..... (1973).

In *Askew* the three-judge court held that the Florida Oil Spill Prevention and Pollution Control Act.[14] was unconstitutional in its entirety. That court reasoned that the Act, which imposed upon the owners and operators of vessels and terminal facilities unlimited liability without fault for clean-up costs incurred by the state and for other damages suffered by the state or private persons as a result of an oil spill originating from the vessel or terminal facility, conflicted with the Water Quality Improvement Act, 33 U.S.C. §§1161 et seq. and also constituted an unconstitutional attempt by the state of Florida to prescribe rules of decision for matters falling within the admiralty jurisdiction of the United States.

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holding of the Supreme Court before we are relieved of our obligation to following previous holdings of that Court.

[13]*See Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917).

[14]L. Fla. 1970 c. 70-244.

The three-judge court also found that those parts of the Act which did not conflict with the Water Quality Improvement Act, *i.e.*, those dealing in compensation for property damage, were nevertheless unconstitutional because they "would effect—in the words of *Jensen*—the 'destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish.'" 335 F. Supp. at 1248. The court reached this conclusion because the Florida Act in imposing liability without fault went far beyond the liability imposed by the general maritime law which was predicated upon negligence or unseaworthiness.

The Supreme Court reversed the judgment of the three-judge court and indicated, first that it found no conflict between the Water Quality Improvement Act and the Florida Pollution Control Act. Second, the Court noted that actions to recover for property damage on shore caused by pollution emanating from vessels on the water were not within the traditional admiralty jurisdiction, *The Plymouth*, 70 U.S. 20 (1865), but were within the admiralty jurisdiction only by virtue of the Admiralty Extension Act, 46 U.S.C. §740. The Court concluded that, at least for injuries actionable in admiralty only by reason of the Admiralty Extension Act, such jurisdiction was not intended to be exclusive and Florida could enact rules of decision of its own to apply to these injuries. On this basis the Court reversed the judgment of the district court holding the Florida Act unconstitutional in its entirety.

Askew had an unusual procedural posture. The ship and terminal operators had sued various state officials for declaratory judgment that the Florida Act was unconstitutional and an injunction against its enforcement. Although there had been no oil spill when suit was

brought the operators claimed a sufficient adverse interest on the ground that they were immediately subject to various licensing, regulatory and financial responsibility provisions of the act. The three-judge court agreed and, after holding the various remedies afforded public and private interests by the Florida Act were unconstitutional, found further that these licensing and financial responsibility provisions were so interwoven with and dependent upon the substantive provisions that they, too, were invalid. 335 F. Supp. at 1250.

As noted, the Supreme Court held that Florida could provide remedies for persons suffering injury on shore from pollution emanating from ships at sea, so-called "ship-to-shore" pollution. It followed that the licensing and financial responsibility provisions of the Florida-enactment, those parts of the Act really at issue in *Askew,* were likewise valid ancillary measures. But the Court in *Askew* was not presented with the issue and did not decide whether other aspects of the Florida law were constitutional. Specifically, the court did not decide whether "ship-to-sea" or "shore-to-sea" pollution were also proper subjects of state concern.

VI.

In the present case we need not decide whether *Askew* is authority for applying California law to the present case of shore-to-ship pollution. Even assuming that the California statutes providing a remedy for nuisance were intended to apply to injuries occurring within the navigable waters,[15] and that, under *Askew,*

[15]While the plain language of Cal. Civ. Code §3479 seems to compel the conclusion that California did intend to apply its nuisance law to interference with navigation rights on navigable streams and other waters there is some case law authority for

(This footnote is continued on next page)

such application would be constitutional, it would not help the plaintiffs in the present case. There is no right under California law to recover for damage to the navigational rights enjoyed by these plaintiffs.

Plaintiffs argue strenuously that "loss of use" of a private pleasure vehicle or vessel is a compensable item of recovery under California law, citing *Valencia v. Shell,* 23 Cal.2d 840, 147 P.2d 558 (1944); *Johnson v. Central Aviation,* 103 Cal. App.2d 102, 229 P.2d 114 (1951); *Story v. Gateway Chevrolet,* 237 Cal. App.2d 705, 47 Cal. Rptr. 267 (1965); and *Malinson v. Black,* 83 Cal. App.2d 375, 188 P.2d 788 (1948).

No doubt this is true. But in each of the cases cited the chattel itself was unavailable for use because of physical damage thereto or wrongful detention thereof.

In the present case plaintiffs' claim is not for "loss of use" of their boats; the boats themselves were perfectly usable. Rather, the claim is for loss of "navigation rights" in the Santa Barbara Channel. Thus their claim is, under California law, a claim for damages arising out of a public nuisance. *People v. Mack,* 19 Cal. App.3d 1040, 97 Cal. Rptr. 448 (1971).

California nuisance law is quite clear. Cal. Civ. Code §3479 provides:

> "Anything which . . . unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

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narrowly construing such statutes so as to not conflict with the admiralty jurisdiction. *See Blevens v. Sfetku,* 259 Cal. App. 2d 527, 66 Cal. Rptr. 486 (1968).

The following sections provide:

> "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." Cal. Civ. Code §3480.
>
> "PRIVATE NUISANCE. Every nuisance not included in the definition of the last section is private." Cal. Civ. Code §3481.

In the recent case of *Venuto v. Owens-Corning Fiberglass Corporation,* 22 Cal. App.3d 116, 99 Cal. Rptr. 350, 355 (1971) the law was summarized as follows:

> "[A] private nuisance is a civil wrong based on disturbance of rights in land while a public nuisance is not dependent upon a disturbance of rights in land but upon an interference with the rights of the community at large."

Interference with the public's right of navigation in the navigable waters of California is a public nuisance. *People v. Mack, supra.* A civil action for damages arising out of a public nuisance cannot be brought by a private litigant unless he has been specially injured. Cal. Civ. Code §3493. *See Yolo County v. City of Sacramento,* 36 Cal. 193 (1868). In *Venuto, supra* at 355, the court said:

> "Where the nuisance alleged is not also a private nuisance as to a private individual he does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different *in kind* from that suffered by the general public. Under this rule the requirement is that the plaintiff's damage be different in kind, rather than in degree, from that shared by the general public." (citations omitted)

The plaintiffs' physical damages are recoverable in negligence and probably also constitute such special injury as to present them with a cause of action for these damages in nuisance. But the damage suffered on account of their loss of navigation rights in the Santa Barbara Channel and harbor is no different in kind from that suffered by the public generally.[16] As Dean Prosser summarized the law:

> "One group of cases has arisen where an established business made commercial use of the public right with which the defendant interfered. Thus when a river is blocked, a steamboat line operating boats upon it, or a company engaged in rafting logs or collecting tolls for passage, has been permitted almost without question to maintain the action. There are several cases in which commercial fisheries making a localized use of public waters have been allowed to recover where the ordinary citizen deprived of his occasional Sunday piscatorial pleasure could not do so." Prosser, "Private Action for Public Nuisance," 52 Va. L. Rev. 997, 1013-1014 (1966). (footnotes omitted)

These plaintiffs were deprived of no more than their "occasional Sunday piscatorial pleasure." For this deprivation there is no recovery either under California law or general maritime law.

The judgment is affirmed.

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[16]"It is not, however, necessary that the entire community be affected, so long as the nuisance will interfere with those who come in contact with it in the exercise of the public right. The obvious illustration, of course, is the obstruction of a public highway which inconveniences only those who are travelling upon it." Prosser, "Private Action for Public Nuisance," 52 Va. L. Rev. 997, 1001-1002 (1966) (footnote omitted).

APPENDIX B.

Report of Special Masters.

United States District Court, Central District of California.

Masterson vs. Union. Civil No. 69-331-ALS, *Master File.*

Oppen vs. Union. Civil No. 69-576-ALS, *Master File.*

Filed: August 4, 1970.

Pursuant to stipulation and orders of the Court in the above entitled class and consolidated actions, Honorable Clarence L. Kincaid, Honorable Lewis Drucker and Honorable Walter H. Odemar were appointed Special Masters to hear and determine all issues in said actions, relating to the claims of damages, and to rule upon the admissibility of evidence in relation thereto.

As part of the procedure heretofore established by the Court and Special Masters, concurred in by counsel for the respective parties, hearings were set for seven representative boat owner claims in order to determine at the outset of many contemplated trials, certain legal issues, to wit, whether maritime law or California law was applicable, and if maritime law was applicable, whether loss of use of pleasure craft was compensable. All the claims set for hearing were settled except the claims of two of the parties hereinafter referred to.

The claims of Arthur J. Luck and Glenn A. Henry came on regularly for trial on July 13, 1970, in the above entitled Court, in the Santa Barbara County Courthouse, Santa Barbara, California, before the said Special Masters. Plaintiffs appeared by James J. Oppen, Esq., their attorney. Defendants Union Oil Com-

pany of California and Mobil Oil Corporation appeared by O'Melveny & Myers, by Allyn O. Kreps, Esq., Girard E. Boudreau, Jr., Esq., and A. Robert Pisano, Esq.; defendant Texaco Inc. appeared by Schell & Delamer, by Richard B. Goethals, Esq. and Thomas J. Kelley, Jr., Esq.; and defendant Gulf Oil Corporation appeared by McCutchen, Black, Verleger & Shea, by Max K. Jamison, Esq., and Roger A. Ferree, Esq.

Plaintiffs Arthur J. Luck and Glenn A. Henry contend that, as a result of the January 28, 1969, oil spill, their respective private pleasure craft sustained physical damage. In addition, plaintiffs claim that, as a result of the occurrence, they lost the use of their respective private pleasure craft for a period of time. Briefs having heretofore been filed by the parties concerning compensation for loss of use, the Special Masters heard oral argument thereon and received a stipulation from the parties concerning physical damage to the respective private pleasure craft owned by plaintiffs Arthur J. Luck and Glenn A. Henry.

The opinion of the Special Masters is as follows:

On or about January 28, 1969, oil began to escape under and near Union Oil Company of California's Platform "A" located on the Outer Continental Shelf of the United States in the Santa Barbara Channel. Such crude oil released was carried by natural forces of winds and tides to various areas of the ocean's surface and toward and in some instances to the adjacent coastlines (hereinafter referred to as "occurrence").

In consequence of the occurrence, the above named claimants, among others, filed an action for alleged damages.

Pursuant to the stipulation and order entered and filed with the Clerk on May 11, 1970, defendant oil companies have agreed to pay to plaintiffs all legally compensable damages arising from a legally cognizable injury caused by the occurrence as defined in said stipulation; providing, however, that the payment assumed under said stipulation and order would not exceed such amounts as defendants or their contractors would have been responsible for in a case of negligence.

The primary issue presented is whether loss of use of pleasure boats is a proper element of damages. The determination of this issue is dependent upon the answer to the question whether admiralty law or state law is applicable to this class. Counsel for plaintiffs concede that if admiralty law is applicable, "loss of use" cannot be considered a proper measure of damages.

The plaintiffs contend that by force of the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331, *et seq.* (1953), California law is applicable and, therefore, "loss of use" is a proper measure of damages. Defendants' position is that admiralty law is applicable and, hence, "loss of use" cannot be considered a compensable damage for pleasure boats.

It is stated in *Rodrigue vs. Aetna Casualty and Surety Co.*, 395 U.S. 352, at pages 355-57, (1969), that:

> "The purpose of the Lands Act was to define a body of law applicable to the seabed, the subsoil and the fixed structures such as those in question here on the outer Continental Shelf. That this law was to be federal law of the United States, applying state law only as federal law and then only when not inconsistent with applicable federal law, is made clear by the language of the Act. Section

> 3 makes it the 'policy of the United States' that the affected areas 'appertain to the United States and are subject to its jurisdiction, control, and power of disposition.' Section 4 makes the 'Constitution and laws and civil and political jurisdiction of the United States' apply 'to the same extent as if the outer Continental Shelf were an area of exclusive federal jurisdiction located within a State.' Since federal law, because of its limited function in a federal system, might be inadequate to cope with the full range of potential legal problems, the Act supplemented gaps in the federal law with state law through the 'adoption of State law as the law of the United States.' Under § 4, the adjacent State's laws were made 'the law of the United States for [the relevant subsoil and seabed] and artificial islands and fixed structures erected thereon;' but only to 'the extent that they are applicable and not inconsistent with . . . other Federal laws.'
>
> "It is evident from this that federal law is 'exclusive' in its regulation of this area, and that state law is adopted only as surrogate federal law. . . ."

The claims and controversies herein arose out of or in connection with the operation conducted on the Outer Continental Shelf; hence, this Court has jurisdiction to hear and determine said claims and controversies by virtue of 43 U.S.C. 1333, subparagraph (b), which provides as follows:

> "The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the

> purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent State nearest the place where the cause of action arose."

We now proceed to the question whether admiralty law is applicable to the facts of the instant case. Plaintiffs assert that state law is applicable to their claims for damages as set forth in the Outer Continental Shelf Lands Act [43 U.S.C. § 1333]. This section, subdivision (a)(2) thereof, states in part:

> "To the extent that they are applicable and not inconsistent with this subchapter or with other Federal law and regulations of the Secretary now in effect or hereafter adopted, the Civil and Criminal Law of each adjacent State . . . are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer Continental Shelf, ..."

Clearly, state law is adopted for the seabed, subsoil, artificial islands and fixed structures only where not inconsistent with federal laws.

The Outer Continental Shelf Lands Act was not intended to destroy or otherwise alter applicable federal

maritime law. It "does not oust admiralty law having a basis of applicability independent from the location of the platforms at sea; indeed, it specifically provides that the general law of the upland state is made applicable federal law *only to the extent* that it is not 'inconsistent with . . . other Federal laws.' In *Rodrigue,* the Supreme Court recognized that limitation." [*Kimble vs. Noble Drilling Corp.*, 416 F. 2d 847, 850 (1969) (U.S. Appl. Pndg)].

Plaintiffs contend that, "Since the negligent act took place upon an artificial island and a fixed structure which would be within the area of the State of California if its boundaries were extended seaward to Platform 'A', it must necessarily follow that all damages which flow from this initial act are compensable under the law of the State of California."

This contention would find support as a general rule if this were a case in which the act and the injury or damage resulting therefrom were confined to the artificial island and fixed structure as exemplified by the facts in *Rodrigue, supra,* wherein the decedent Rodrigue was performing a test on a drill pipe. He was high on a derrick rising above the artificial island, and fell from it to his death on the floor of the structure (p. 354). The Court declared "that maritime law was inapposite to these fixed structures" (p. 363). But when the effect that was produced by the act, such as in the instant cases, took place upon navigable waters, then admiralty law becomes apposite and predominates over state law. "Upon navigable waters" is to be equated

with "admiralty jurisdiction." [*Michigan Mutual Liability Co. vs. Arrien,* 233 F. Supp. 496, 501 (1964).]

In *Guess vs. Reed,* 290 F. 2d 622, at p. 625, (1961), it is stated that:

> "The Continental Shelf Act was enacted for the purpose primarily, of asserting ownership of and jurisdiction over the minerals in and under the Continental Shelf. Jurisdiction was asserted over the 'subsoil and seabed' of the Continental Shelf. 43 U.S.C.A. § 1332(a). It is only for 'that portion of the subsoil and seabed of the Outer Continental Shelf and artificial islands and fixed structures erected thereon' that state law applies. 43 U.S.C.A. § 1332(a)(2). This does not include the sea above the subsoil and seabed. . . . That this is the intent is further shown by the provision that the Act 'shall be construed in such a manner that the character as high seas on the waters above the Outer Continental Shelf and the right to navigation and fishing therein shall not be affected.' 43 U.S.C.A. § 1332(b)."

> "The admiralty jurisdiction in tort was traditionally 'bounded by locality' . . . encompassing all torts that took place on navigable waters. . . ." [*Nacirema vs. Johnson,* 396 U.S. 212, p. 215, note 7; see also, *Weinstein vs. Eastern Air Lines,* 316 F. 2d 758, 761.]

In applying the "locality" test for admiralty jurisdiction, the tort is deemed to occur, not where the wrongful act or omission had its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action. [*Hough vs. The*

Western Transportation Co., 70 U.S. 125, 3 Wall. 20 (1866).]

In *Smith vs. Lampe*, 64 F. 2d 201 (1933), at p. 202, the Court cited the rule, ". . . that where the negligent acts originates on land and the damage occurs on water, the cause of action is within the admiralty jursidiction. . . ."

Analogous to the cases at bar, and which aptly illustrates the "locality" test for admiralty jurisdiction, is *McCall vs. Susquehanna*, 278 F. Supp. 209. There, floodgates of a dam were opened without warning to the occupants of boats on a navigable river, causing decedent's boat to capsize. The decedent was fishing from a small boat anchored in the river below the dam. The Court held that:

> "It is not the place where the negligent acts occur that is important, but rather the place where the tort occurs. A tort is deemed to occur not where the wrongful act or omission has its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action."

In *Dagger vs. U.S.N.S. Sands*, 287 F. Supp. 939 (1968) the Court stated that:

> "Numerous authorities may be found to the effect that every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance, providing the substance and consummation of the wrong and injury takes place upon these waters."

The Special Masters are of the opinion that admiralty law is applicable to the cases at bar.

Since maritime law applies herein, loss of use of pleasure boats cannot be considered as an element of damages. *The Conqueror,* 166 U.S. 110, 17 Sup. Ct. 510 (1897) and subsequent cases based thereon appear presently to be decisive of that issue.

See: *The Beaver,* 287 F. 679 (1923)

A.T.S.F. Ry.Co. vs. Calif. Sea Products Co., 51 F. 2d 466 (1931)

Amer. Hawaiian S.S. Co. vs. The S.S. San Clemente, 1943 A.M.C. 758 (1943)

Thompson vs. U.S., 266 F. 2d 852 (1959)

Crain Bros., Inc. vs. Duquesne Slag Prod. Co. 273 F. 2d 948 (1959)

In *The Conqueror, supra,* the plaintiff sought recovery for loss of use of his pleasure yacht because it was improperly seized by the U.S. Customs Officer for duties claimed to be owing to the U.S. Government. The trial court awarded the vessel owner $15,000.00 for loss of use. The Supreme Court reversed, stating that:

> "It is not the mere fact that a vessel is detained that entitles the owner to demurrage. There must be pecuniary loss, or at least a reasonable certainty of pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel for the purposes of pleasure, ... In other words, there must be a loss of profits in its commercial sense. In all of the cases in which we have allowed demurrage, the vessel has been engaged, or was capable of being engaged in a profitable commerce, and the amount allowed was determined either by the charter value of such vessel, or by her actual earnings . . ."

We have considered the dictum in *Brooklyn East Terminal vs. United States,* 287 U.S. 170 (1932), involving damages for loss of use of a commercial vessel. However, as heretofore indicated, subsequent cases have continued to follow the rule enunciated in *The Conqueror* that loss of use of boats used for pleasure is not compensable.

Therefore, it is the ruling of the Special Masters that loss of use of the pleasure boats in question cannot be considered as an element of damages. Defendants' objection to the introduction of plaintiffs' evidence on the issue of loss of use is sustained.

It has been stipulated between the parties that the uncompensated physical damage suffered by plaintiff *Henry* is the sum of $413.25, and the physical damage suffered by plaintiff *Luck* is the sum of $680.00.

The matters having been submitted to the Panel of Special Masters for decision and after deliberation thereon, the Panel now renders its decision in writing in favor of plaintiffs Arthur J. Luck and Glenn A. Henry and against defendants Union Oil Company of California, Mobil Oil Company, Texaco Inc. and Gulf Oil Corporation and makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Pursuant to the stipulation and order entered and filed with the Court on May 11, 1970, defendants have agreed to pay to plaintiffs all legally compensable damages arising from a legally cognizable injury caused by the occurrence as defined in said stipulation and order; providing, however, that the payment assumed under said stipulation and order shall not exceed such

amounts as defendants or their contractors would have been responsible for in a case of negligence.

2. At all times relevant hereto, plaintiff Arthur J. Luck was the owner of a 28′ Columbia fiberglass sailboat, known as "MABUHAY," which was moored at the Santa Barbara Marina in Santa Barbara, California.

3. At all times relevant hereto, plaintiff Glenn A. Henry was the owner of a 33′ cabin cruiser, known as the "KEY LARGO," which was moored at the Santa Barbara Marina in Santa Barbara, California.

4. The alleged injuries for which recovery is here sought arose and occurred on the navigable waters of the Santa Barbara Channel and Harbor.

5. The parties have stipulated that, as a proximate result of the January 28, 1969, occurrence, the "MABUHAY" and the "KEY LARGO" sustained physical damage in the respective amounts of $680.00 and $413.25. Said damages are legally compensable and arose from a legally cognizable injury.

6. At all relevant times prior to the January 28, 1969 occurrence, as plaintiffs concede, their respective private pleasure craft were neither used nor intended to be used for chartering or other profit-oriented activities. Said claims for loss of use are made on the sole basis that the respective plaintiffs were allegedly deprived of their personal yachting pleasure and that they were unable to use their private pleasure craft in the Santa Barbara Channel for a period of time following and as the result of the January 28, 1969 occurrence.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and of the subject matter of this suit under the Outer Continental Shelf Lands Act, §43 U.S.C. § 1331, *et seq.*, and admiralty law. 28 U.S.C. § 1333(1).

2. Under well established criteria and case precedent, admiralty law is applicable to and governs the within claims for loss of use. California law is not applicable.

3. Plaintiffs are not entitled to compensation for the loss of their respective private pleasure craft. To recover for loss of use under admiralty law, there must be pecuniary loss or at least a reasonable certainty of pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel for the purposes of pleasure. There must be a loss of profits in its commercial sense. Since plaintiffs seek to recover for loss of use only on the basis of their alleged inability to use the vessel for the purposes of pleasure, said loss of use does not constitute a legally cognizable injury and is not legally compensable and plaintiffs are not entitled to recover therefor.

4. Plaintiff Arthur J. Luck is entitled to judgment against the within defendants in the sum of $680.00; and plaintiff Glenn A. Henry is entitled to judgment against the within defendants in the sum of $413.25.

The Special Masters therefore recommend that the Court direct entry of a judgment in favor of plaintiff Glenn A. Henry against the defendants herein for the sum of $413.25, and in favor of plaintiff Arthur J. Luck against the defendants herein for the sum of $680.00.

It is further recommended by the Special Masters that the Court determine that there is no just reason for delay in the entry of judgment in favor of these two plaintiffs who are part of a single class of boat owner plaintiffs in consolidated actions on file herein, and that, therefore, the Court direct that judgment be entered in their behalf.

DATED: August 4, 1970.

CLARENCE L. KINCAID
Clarence L. Kincaid
LEWIS DRUCKER
Lewis Drucker
WALTER H. ODEMAR
Walter H. Odemar
Special Masters

APPENDIX C.

Judgment.

United States District Court, Central District of California.

Masterson, vs. Union. Civil No. 69-331-ALS, *Master File.*

Oppen, vs. Union. Civil No. 69-576-ALS, *Master File.*

Filed: August 18, 1970.

Pursuant to Rule 53(e) (2) of the Federal Rules of Civil Procedure, the Report of Special Masters filed with the Court on August 4, 1970, is hereby accepted and adopted. The Court expressly determines that there is no just reason for delay and in accordance with the provisions of Rule 54(b) of the Federal Rules of Civil Procedure, entry of one final judgment in favor of plaintiffs Arthur J. Luck and Glenn A. Henry is hereby directed.

IT IS, THEREFORE, ADJUDGED AND DECREED that plaintiffs Arthur J. Luck and Glenn A. Henry recover the sum of $680.00 and $413.25, respectively, from defendants Union Oil Company of California, Mobil Oil Corporation, Texaco Inc., and Gulf Oil Corporation.

IT IS FURTHER ADJUDGED AND DECREED that one-third of said sums be deposited with the Clerk of the Court in the special registry account to be applied towards the payment of attorney fees, in whole or in part, as hereafter directed by the Court.

DATED: August 18, 1970

/s/ Albert Lee Stephens, Jr.
Albert Lee Stephens, Jr.
United States District Judge

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-802

ARTHUR J. LUCK AND GLENN A. HENRY,

Petitioners,

vs.

UNION OIL CO. OF CALIF.; MOBIL OIL CORP.; GULF OIL CORP.; TEXACO INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Respondents in Opposition.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Respondents in Opposition.

Question Presented.

The opinion of the Court of Appeals for the Ninth Circuit holds that owners of private pleasure boats, which boats were not for hire and were used solely for recreational purpose, may not maintain a cause of action for alleged loss of use of said boats occasioned by an obstruction to navigation arising out of an oil spill. Thus, the question raised by the Petition is whether the opinion of the Court of Appeals is correct.

Statute Involved.

The provisions of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333, *et seq.*, which are set forth in the Petition at pages 3-4.

Statement of the Case.

The jurisdiction of the District Court was invoked pursuant to the Outer Continental Shelf Lands Act ("Lands Act") 43 U.S.C. § 1301, *et seq.*, because the actions arose out of the escape of oil near and under respondents' fixed drilling platform located on federal-leased lands on the Outer Continental Shelf of the United States. Numerous suits arising out of the oil spill were filed in or removed to the United States District Court for the Central District of California. A major class action was established and several other cases consolidated under a stipulation wherein the defendant oil companies agreed to pay to plaintiffs "all legally compensable damages arising from a legally cognizable injury caused by the occurrence . . ., provided, however, that payment assumed hereby will not exceed such amounts and such claims as said defendants or their contractors would be responsible for in a case of negligence." It was further agreed that the claims of the various claimants subject to the stipulation would be tried before three Special Masters appointed by the Court and that any settlements pertaining to such claims would be approved by said Special Masters.

One of the classes of persons claiming injury by reason of the oil spill consisted of owners of pleasure boats which were not for hire and were used solely for recreational boating. In order to resolve certain common questions of law and fact, seven claims designated as "test cases" were selected for trial. On the eve of

trial, a tentative settlement agreement was reached between counsel and the terms of that settlement were offered to all pleasure boat owner claimants (whose claims were in excess of $300.00) and were ultimately accepted by 108 of those claimants, including five of the seven "test case" claimants. The settlement was thereafter approved by the District Court on July 24, 1970. At the same time, the Court approved settlements which had been made earlier involving 131 additional pleasure boat owners whose claims were for less than $300.00. These settlements left unresolved the claims of but 24 pleasure boat owners or less than 10 percent of the original class of pleasure boat owners.

The two remaining test cases, those of petitioners herein, commenced to trial before the Special Masters sitting *en banc*. The Masters ruled that the law of admiralty applied to the obstruction to navigation complained of, and recommended that recovery for loss of use of a noncommercial nature be denied on the authority of *The Conqueror*, 166 U.S. 110 (1897). The Masters further recommended that damages for physical injury to plaintiffs' vessels be allowed and made findings as to the amount of such physical damages. Petitioners objected to the recommendations and findings of the Special Masters and upon full briefing and argument the trial court approved the Masters' report and entered judgment accordingly. Plaintiffs thereupon appealed from the judgment of the trial court insofar as it denied recovery of damage for the alleged noncommercial loss of the recreational use of their

pleasure craft occasioned solely by the obstruction to navigation caused by the presence of oil on navigable waters.

On appeal, the Ninth Circuit having the benefit of the intervening decisions of this Court in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972) and *Askew v. American Waterways Operators, Inc.*, 41 U.S.L.W. 4507 (1973) observed that substantive admiralty law does not automatically apply to all torts committed on the navigable waters and therefore did not necessarily oust the law of the State of California which would otherwise apply under the Outer Continental Shelf Lands Act. It therefore analyzed plaintiffs' claim under *both Federal maritime law and California law* and found that *neither* allowed recovery of the damages sought by plaintiffs. It thereupon affirmed the judgment of the District Court.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

I.

The Application of State Law Is an Independent Ground for the Opinion.

In the first of two arguments presented as reasons why this Court should grant a Writ of Certiorari, petitioners contend that State law not Federal maritime law applies to the obstruction to navigation occasioned by the oil spill. Although, as set forth below, (i) the Ninth Circuit properly interpreted *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352 (1969) in conjunction with *Executive Jet Aviation* and *Askew* in applying admiralty law to this case and (ii) no conflict exists between the decisions of the Fifth Circuit and Ninth Circuit interpreting the "Lands Act," the decision below also held that the damages sought by petitioners *are not recoverable under California law*. Petitioners do not suggest that the Ninth Circuit did not properly apply California law. Thus the correctness of that portion of the opinion is not in issue and because this independent state ground for the decision below is a sufficient basis in and of itself upon which to predicate the opinion, review by this Court is neither necessary or desirable.

II.

The Decision Below Is Clearly Correct.

The decision below is not inconsistent with the decisions of this Court. *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352 (1969) and *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) established the rule that as to injuries occurring on drilling platforms located on the Outer Continental Shelf of the United States,

State law is made applicable under the "Lands Act" as if it were the Federal law, and that admiralty law does not apply to such injuries. However, the present case does not involve an injury occurring on an offshore drilling platform but instead relates to injury caused by the obstruction of navigable waters by reason of the escape of oil from the ocean floor under and near a drilling platform. The Court of Appeals held that although this interference with navigation constituted a justiciable issue under both Federal maritime law *and* California law, both bodies of law do not permit recovery for the alleged damages sought by petitioners.

In reaching its opinion the Court of Appeals considered the recent decisions of this Court in *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249 (1972) and *Askew v. American Waterways Operators, Inc.,* 41 U.S.L.W. 4507 (1973). The Court of Appeals found that the alleged loss of use of a pleasure vessel caused by an obstruction to navigation, had sufficient relationship to traditional maritime activities to allow the application of Federal maritime law under the doctrine of *Executive Jet Aviation, supra.* Under maritime law there can be no recovery for loss of recreational use of a vessel used strictly for personal pleasure. *The Conqueror,* 166 U.S. 110 (1897). The Court further stated that the recent decision of this Court in *Askew v. American Waterways Operators, Inc., supra,* does make it appropriate to consider whether the damages sought by petitioners were recoverable under the law of California. Upon such consideration the Court held that under California law the plaintiffs could not recover because the act complained of constituted a public nuisance and plaintiffs' loss of navigation rights

was an injury no different in kind from that suffered by the public generally. It concluded:

> "These plaintiffs were deprived of no more than their 'occasional piscatorial pleasure.' For this deprivation there is no recovery *either* under *California law or general maritime law.*"

III.

No Conflict Exists Between This Opinion and the Opinions of the Fifth Circuit Court of Appeals.

No conflict exists between the opinion below and the opinions of the Court of Appeals for the Fifth Circuit. In fact in reaching its decision that ". . . the Outer Continental Shelf Lands Act, as interpreted in *Rodrigue,* does not preclude the application of maritime law to claims with a maritime nexus wholly apart from the location of the platform on navigable waters," the Ninth Circuit specifically relied on the Fifth Circuit decision in *Kimble v. Noble Drilling Corp.,* 416 F.2d 847 (5th Cir., 1969) *cert. denied* 397 U.S. 918 (1970). The cases cited by petitioners in support of their contention that a conflict exists are inapposite to the facts of this case. *Bertrand v. Forest Corp.,* 441 F.2d 809 (5th Cir., 1971). (Wrongful death action where plaintiff's husband apparently fell to sea from offshore drilling platform held not maritime tort); *Peytavin v. Government Employees Insurance Co.,* 453 F.2d 1121 (5th Cir., 1972). (Injuries sustained in auto accident while on floating pontoon at ferry landing not properly within jurisdiction of admiralty). More on point is the decision of the District Court for the Southern District of Texas in *Armstrong v. Chambers & Kennedy,* 340 F. Supp. 1220 (S.D. Tex., 1972) which interpreted the decisions of this Court and of the

Fifth Circuit to apply Federal maritime law to injuries sustained to a vessel and its crew arising from an explosion on an offshore platform.

IV.
The Conqueror Should Not Be Overruled.

Concerning the holding of *The Conqueror,* 166 U.S. 110 (1897) that loss of use of a pleasure boat not used for hire is not compensable, the Ninth Circuit properly characterized the language in *Brooklyn Eastern District Terminal v. United States,* 287 U.S. 170 (1932) as dicta and disregarded *Finkel v. Challenger Marine Corp.,* 316 F. Supp. 549 (S.D. Fla., 1970) (wherein no appeal was taken to the Court of Appeals for the Fifth Circuit) as being contrary to the express holding of this Court in *The Conqueror.* Clearly the Fifth Circuit would not look favorably upon the District Court's disregard of the long-established rule that an award of damages for detention of a vessel must be founded on proof of actual loss of profits. As recently as May 17, 1973, Judge Wisdom speaking for the Court in *Skou v. United States,* 478 F.2d 343 (5th Cir., 1973) reiterated the rule and remanded that case to allow the plaintiff to present evidence of actual commercial loss. The reporters are replete with decisions like that of the Fifth Circuit following the rule of *The Conqueror.* See, *e.g., Crain Bros., Inc. v. Duquesne Slag Prod. Co.,* 273 F.2d 948 (3rd Cir., 1959); *Thompson v. United States,* 266 F.2d 852 (4th Cir., 1959); *Atchison T. & S.F. Ry. Co. v. California Sea Products Co.,* 51 F.2d 466 (9th Cir., 1931); *The Beaver,* 287 Fed. 679 (9th Cir., 1923); *The State of California,* 54 Fed. 404 (9th Cir., 1893); *Johnson's Branford Boatyard, Inc. v. Yacht Altair,* 260 F. Supp.

841 (D. Conn., 1966); *American-Hawaiian S. S. Co. v. The S. S. San Clemente*, 1943 A.M.C. 758 (N.D. Calif., 1943).

That the use of a pleasure boat may constitute imputed income under the Federal income tax laws, *Offshore Operations Trust v. Commissioner (Baird v. Commissioner)*, 32 CCH Tax Ct. Mem. ¶32,149 (M) (1973-212), has no relevance to whether a well-established rule of admiralty should be altered.

Traditionally, admiralty has limited tort recovery to cases involving commercial loss. Recent decisions of this Court have tended to more closely confine admiralty to its traditional sphere, allowing State law to assume concurrent jurisdiction in areas that will not run contrary to the general purposes of maritime law. Thus in *Askew v. American Waterways Operators, Inc.*, 41 U.S.L.W. 4507, 4511 (1973) this Court stated, quoting Chief Justice Hughes' opinion in *Just v. Chambers*, 312 U.S. 383 (1941):

> ". . . [T]he principle was maintained that a State, in the exercise of its police power, may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, provided that the state action 'does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations.' "

See also *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972); *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971); *Rodrigue v. Aetna Cas-*

ualty and Surety Co., 395 U.S. 352 (1969). The loss of use of a pleasure craft in coastal waters by reason of oil pollution is an area in which the several states have an interest and the protection of that interest need not run counter to the purposes of maritime law. Thus, it is an area in which according to *Askew* the various states can exercise their jurisdiction and under the authority of *Askew*, California law may properly be applied to petitioners' claim. But under California law no recovery can be had. Thus there is no compelling reason to consider let alone overrule the long-established rule of maritime law enunciated in *The Conqueror* and thereby upset the uniform international and interstate maritime rule. As State and Federal law can be applied concurrently no reason exists to overrule the law so long applied to maritime affairs with respect to its harmony and uniformity in its international and interstate relations.

Conclusion.

The Petition shows no reason why the applied for Writ of Certiorari should be granted. We submit, for the reasons stated herein, that it should be denied.

Respectfully submitted,

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Question Presented.

The importance and substantiality of the questions presented for review have not been denied. The only claim of the respondents appears to be that the Court should decide the question upon the basis of nuisance, rather than upon the basis of the negligence to which they stipulated in the trial Court. Review here is suggested by virtue of the tacit admission that sufficient grounds for the issuance of a Writ of Certiorari exist.

Reply Brief Is Addressed to Arguments Raised by the Respondents in Their Brief in Opposition.

In their opening brief, petitioners advised this Court that the respondent oil companies had agreed to pay, "all legally compensable damages arising from a legally cognizable injury." Respondents correctly advised this Court that the stipulation did indeed contain much more, and quoted further from the stipulation saying, ". . . provided, however, that payment assumed hereby will not exceed such amounts and such claims as defendants or their contractors would be responsible for in a case of negligence."

After advising the Court of this fact, respondents appear to have switched the thrust of their position from negligence to nuisance, and urge this Court to deny the Petition upon grounds that the damages sought by petitioners are not recoverable under California law. Respondents go so far as to italicize for emphasis this contention throughout their brief.

By raising this contention, and now urging that nuisance law applies, rather than negligence, respondents now compel petitioners to cite California law to this Court in support of the fact that *California law does indeed provide a remedy to these petitioners* for loss of use of a pleasure boat.

California Courts consistently award damages for loss of use of personal property, and this right has now become so firmly established that it is no longer open to question. Loss of use of a repairable chattel is compensable whether the chattel be an automobile, a truck, a boat, an airplane, or any other chattel, and it makes no difference whether the chattel in question is used for business or for pleasure.

Since the Petition concerns itself with the loss of use of a pleasure boat, it is proper to cite to this Court the leading case in California, which upholds an award of damages for the wrongful detention of such a boat. In *Story v. Gateway Chevrolet Co.* (1965), 237 Cal.App. 2d 705, plaintiff's boat was wrongfully withheld from him by the defendant for a total of 143 weekends. The Court found that the boat was used principally on weekends and only for pleasure and awarded damages based upon the reasonable rental value of that boat.

Other cases which uphold the right to recover for loss of use are *Malinson v. Black* (1948), 83 Cal.App.2d 375 (an automobile). *Hurd v. Barnhart* (1878), 53 Cal. 97 (wagons). *Valencia v. Shell Oil Co.* (1944), 23 Cal.2d 840 (a truck). *Johnson v. Central Aviation Corp.* (1951), 103 Cal.App.2d 102 (an airplane). *Meyers v. Bradford* (1921), 54 Cal.App. 157 (an automobile).

Only in *Story* and *Malinson* did the Court consider that the chattel was used principally for pleasure, and that each plaintiff did not derive a pecuniary benefit from the use of the chattel. In each of those cases, the Court found that it made no difference whether the chattel was used for business or for pleasure. In the other cases cited, the Court at no time attempted to distinguish that the loss of use of the chattel involved commercial benefit as distinguished from loss of use for pleasure. Accordingly, the italicized emphasis of the respondents should be disregarded.

Respondents in contending that *The Conqueror*, 166 U.S. 110 (1897) should not be overruled simply state to this Court that the long-established rule denying recovery for detention of a vessel must be founded on

proof of actual loss of profits, and totally disregard that portion of the Petition wherein petitioners have set forth solid reasons why the time has come for this Court to overrule the doctrine of *The Conqueror*, and the drastic and dramatic changes that have taken place in the American way of life since that doctrine was enunciated. They merely cite to the Court many of the decisions following the rule of *The Conqueror*. It is interesting to note that none of the cases cited appear to reflect that anyone petitioned for a Writ of Certiorari.

Conclusion.

In the light of the tacit admission by the respondents that the Writ should be granted, and the failure of the respondents to deny the importance and substantiality of the questions presented, the Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners.